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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2000

ALLMERICA FINANCIAL LIFE INSURANCE AND ANNUITY COMPANY,

Petitioner,

v.

WILLIAM A. MILLER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

KIMBERLY R. WEST, ESQ.
*MICHAEL L. JACKSON, ESQ.
MARK M. HOGEWOOD, ESQ.
Wallace, Jordan, Ratliff & Brandt, L.L.C.
P.O. Box 530910
Birmingham, Alabama 35253
(205) 870-0555

Attorneys for Petitioner

*Counsel of Record

58pp

QUESTION PRESENTED

Does the Federal Arbitration Act and the National Association of Securities Dealers ("NASD") Code of Arbitration Procedure require the arbitration of an employment dispute between an NASD member insurance company and one of its agents who signed a "Form U-4" containing an agreement to arbitrate disputes with NASD members in accordance with NASD rules, as four federal circuit courts of appeals have held, or does the NASD Code of Arbitration Procedure's exception for "disputes involving the insurance business of any member which is also an insurance company" preclude arbitration of such employment disputes as a matter of law, as the Supreme Court of Alabama has held?

LIST OF PARTIES

Petitioner Allmerica Financial Life Insurance and Annuity Company was an Appellant in the Supreme Court of Alabama and a Defendant in the trial court.

Respondent William A. Miller was the Appellee in the Supreme Court of Alabama and the Plaintiff in the trial court.

Nowlin & Associates also was an Appellant in the proceedings before the Supreme Court of Alabama and a Defendant in the trial court.

CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH SUPREME COURT RULE 29.6

Petitioner Allmerica Financial Life Insurance and Annuity Company is a wholly owned subsidiary of First Allmerica Financial Life Insurance Company, and First Allmerica Life Insurance Company is a wholly owned subsidiary of Allmerica Financial Corporation.

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PETITION FOR WRIT OF CERTIORARI

Allmerica Financial Life Insurance and Annuity Company ("Allmerica") respectfully petitions this Court to issue a writ of certiorari to review the June 23, 2000, judgment of the Supreme Court of Alabama denying Allmerica the right to arbitrate the claims made against it by Respondent William A. Miller.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama appears in the Appendix to the Petition at Appendix A, page A1, and will be, but has not yet been, published in West's Southern Reporter (second series), the official reporter for Alabama decisions. It has been unofficially published in electronic formats, including Westlaw at 2000 WL 804448, Lexis at 2000 Ala. LEXIS 285, and the Internet at http://www.wallacejordan.com/1980529.htm. The order of the Circuit Court of Jefferson County, Alabama, denying Allmerica's Motion to Compel Arbitration and for Stay Pending Arbitration is printed in the Appendix to the Petition at Appendix B, page A14, and is unpublished.

JURISDICTION

The Supreme Court of Alabama issued its decision affirming the trial court's denial of Allmerica's motion to compel arbitration on June 23, 2000. No application for rehearing was filed. A copy of the Supreme Court of Alabama's decision appears at Appendix A, page A1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 (1994), provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The National Association of Securities Dealers ("NASD") was created under the authority granted by the 1938 Maloney Act amendments to the Securities Exchange Act of 1934. 52 Stat. 1070, 15 U.S.C. § 78*o*-3; *International Ass'n of Machinists v. Street*, 367 U.S. 740, 809 n.16 (1961); NASD Manual, Administration (CCH) 151 (1996).[1] The NASD

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[1] The 1996 version of the NASD Manual is the one in effect at the time this action was filed. However, there do not appear to be any material changes between the 1996 version and the current version that concern the issues in this case. The 1998 amendment to the NASD Code of Arbitration Procedure provides that associated

(continued...)

adopted a Code of Arbitration Procedure in accordance with Article VII, § 1(a) of its by-laws. Section 10101 of the NASD Code of Arbitration provides:

> This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> (a) between or among members;
>
> (b) between or among members and associated persons;

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[1] (...continued)
persons will not be required to arbitrate statutory employment discrimination claims, but that other employment-related disputes will still be subject to mandatory arbitration. Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35299 (June 22, 1998). This amendment became effective on January 1, 1999, for claims filed on or after that date. Miller's claims were filed in 1997 and do not involve any statutory employment discrimination claims. The current version of the NASD Manual is available over the Internet at http://secure.nasdr.com.

> (c) between or among members or associated persons and public customers, or others; and
>
> (d) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

NASD Manual, Code of Arbitration Procedure (CCH) § 10101 at 7511-12 (1996) (hereinafter "NASD Code"). In addition, § 10201(a) of the NASD Code provides as follows:

> (a) Any dispute, claim or controversy eligible for submission under Part 1 of this Code between or among members and/or associated persons and/or certain others, raising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) by and with such member, shall be arbitrated under this Code, at the instance of:
>
> . . . .

> (2) a member against a person associated with a member or a person associated with a member against a member . . . .

NASD Code § 10201, at 7541.

STATEMENT OF THE CASE

I. Factual Background and Nature of the Claims

This case concerns the enforceability of an arbitration provision in a Uniform Application for Securities Industry Registration (Form U-4) in a dispute involving an agent's employment. The facts material to the issues presented in this petition are not in dispute, although the parties disagree as to the characterization of the Plaintiff's claims and as to the lower courts' interpretation of the "insurance business" exception in § 10101 of the NASD Code of Arbitration ("NASD Code").

William A. Miller was hired by Allmerica Financial Life Insurance and Annuity Company ("Allmerica") (then known as SMA Life Assurance Company) in 1983. In 1984, Miller executed a Form U-4 in order to register with the National Association of Securities Dealers ("NASD") to sell variable life and annuity contracts. The Form U-4 signed by Miller contains the following provision:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organization with which I register, as indicated in Question 8.

The organization with which Miller registered as indicated in "Question 8" was the NASD. The arbitration rules of the NASD require "the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company . . . between or among members and associated persons . . . ." NASD Code § 10101. Allmerica is a member of the NASD. Miller is an "associated person" as those terms are defined by the NASD Bylaws.

In June 1997, Miller terminated his employment with Allmerica. In September 1997, Miller filed a civil action in the Circuit Court of Jefferson County, Alabama, against Allmerica and the local general agency through which he worked, Nowlin & Associates ("Nowlin").

Miller's claims stem from his employment as an agent with Allmerica through Nowlin. Miller contends that Allmerica and Nowlin misrepresented aspects of his employment and compensation, and he also contends that Allmerica committed other forms of misconduct with regard to his employment. Specifically, Miller contends he was "strongly encouraged" to sell Payroll Exceptional Life ("PEL") products, that "he was assured he would be compensated based on his production, including continued commissions and vesting," that Allmerica sold the PEL products to American Heritage Life Insurance Company in September 1995, and that Allmerica and Nowlin falsely "represented . . . that the PEL customers were his clients, they would continue to be his clients and . . . he would continue to collect commissions, income and vesting." Based on these allegations, Miller characterizes his causes of action as follows: breach of contract, deceit, misrepresentation, negligence, recklessness, wantonness, fraudulent deceit, suppression, and intentional interference with business relations. He does not make any claims that Allmerica breached any contractual or

other obligation to any policyholder, nor does he claim that Allmerica violated any insurance law or regulation. (R. at 2-15 (Compl.)).[2]

II. Motion to Compel Arbitration in Trial Court Presenting Federal Question

In response to Miller's Complaint, Allmerica filed a detailed Motion to Compel Arbitration and for Stay Pending Arbitration, asking the court to compel arbitration and to stay all further proceedings "pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ('FAA')," and in accordance with the terms of the Form U-4 signed by Miller and the NASD Code of Arbitration Procedure. (R. at 18-68 (Mot. to Compel Arbitration)). The motion also cited as authority this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Perry v. Thomas*, 482 U.S. 483 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). But for the application of the Federal Arbitration Act ("FAA"), the arbitration agreement would not be enforceable in Alabama state courts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) ("*Terminix*"); *Ex parte Jones*, 628 So. 2d 316, 317 (Ala. 1993); Ala. Code § 8-1-41 (1993).

The trial court denied the motion to compel arbitration, relying on the Supreme Court of Alabama's decision in *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998), *cert. dismissed*, 119

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[2] Citations to the record on appeal before the Supreme Court of Alabama will be in conformity with P.7 (pp. 18-19) and T.8 (pp. 307-08) of *The Bluebook: A Uniform System of Citation* (17th ed. 2000).

S. Ct. 921 (1999),[3] a case in which the court denied an insurance company's motion to compel arbitration of an employment dispute between it and its employee under the NASD Code. (App. at A14 (trial court's order)). Allmerica and Nowlin filed a motion to vacate, alter, or amend the order denying their motion to compel arbitration, and that motion was also denied.

III. Appeal to the Supreme Court of Alabama and Its Declining to Follow the "Clear Majority" of Cases

Allmerica and Nowlin both filed appeals to the Supreme Court of Alabama under the authority of 9 U.S.C. § 16, which gives a right of appeal from an order denying a motion or petition to compel arbitration. In its brief to the Supreme Court of Alabama, Allmerica again raised federal issues and argued that the Supreme Court of Alabama's "construction of the 'insurance business' exception of the NASD Code in *Hagan* was erroneous and should be overruled because it is contrary to the strong federal policy favoring arbitration that is embodied in the Federal Arbitration Act, is contrary to the NASD Code and its history, is contrary to the weight of authorities from other jurisdictions, and is contrary to the congressional intent that the same results regarding an arbitration agreement be reached in both state and federal courts in similar cases."

During the pendency of the appeal, Allmerica supplemented its briefs with letters informing the court of additional federal cases released after the submission of briefs which supported Allmerica's position that Miller's claims against it were due to be arbitrated. Some of these cases cited

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[3] The dismissal in *Hagan* was by agreement of the parties in accordance with Supreme Court Rule 46.1 after a settlement of the case. *Minnesota Mut. Life Ins. Co. v. Hagan*, 119 S. Ct. 921 (1999).

Hagan and were critical of the Supreme Court of Alabama's reasoning.

The Supreme Court of Alabama affirmed the trial court's denial of Allmerica's motion to compel arbitration by a vote of 6-3. (App. at A1-A12.) The court's opinion quoted extensively from its previous decision in *Hagan*, including a statement that "'the employment of insurance agents by an insurance company involves the insurance business of the insurance company.'" (App. at A9 (quoting *Hagan*).) The opinion then noted Allmerica's request to overturn *Hagan* and cited 21 cases on which this request was based, including decisions of the U.S. courts of appeals for the Third, Fifth, Tenth, and Eleventh circuits. The court followed this citation of significant authority, most of which were federal cases, with one sentence stating: "We are not persuaded that we should overrule *Hagan*." (App. at A12.)

Chief Justice Hooper, Justice Maddox, and Justice See dissented concerning the denial of arbitration as to Allmerica (but not as to Nowlin). Justice See, joined by the other dissenters, wrote:

> In denying Allmerica's motion to compel arbitration, the trial court relied on *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998). In *Hagan*, this Court held that an employment dispute with an insurance company necessarily involves the insurance business of that company and therefore comes within the insurance business exception under § 10101 of the Code of Arbitration of the National Association of Securities Dealers. The holding of *Hagan* is contrary to the clear majority of cases, as cited in the main opinion. I would overrule *Hagan* and, in accordance with the clear majority of authority, hold that plaintiff

> William A. Miller's employment dispute with Allmerica does not involve the business of insurance and is therefore arbitrable.

(App. at A12-A13 (See, J., concurring in part and dissenting in part) (footnote omitted)).

Thus, the Supreme Court of Alabama was presented with the "clear majority" of cases — most of which were federal cases and four of which were decisions of U.S. circuit courts of appeals — but was not persuaded that its previous interpretation of the insurance business exception of § 10101 of the NASD Code, which conflicts with that "clear majority" of cases, was erroneous.

Because the issue had been before the Supreme Court of Alabama in *Hagan* and in the present case, and because Allmerica had presented the great weight of contrary authority to the court, it was clear to Allmerica that there were no additional arguments to be presented which could persuade the court to change its decision. Thus, Allmerica did not file an application for rehearing with the Supreme Court of Alabama, deciding instead to proceed with this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Alabama's decision conflicts with the decisions of four federal circuit courts of appeals, as well as numerous other federal courts. The decision in the present case is also in conflict with the strong federal policy favoring arbitration as established by the Federal Arbitration Act and this Court's decisions interpreting it. The decision below also will cause different outcomes in similar cases depending on the court in which the case is filed, which is contrary to the intent of the FAA, and it is also contrary to the language and drafting

history of the NASD Code. Therefore, to resolve the conflict between the Supreme Court of Alabama and four federal circuit courts of appeals, to effectuate this Court's interpretation of the FAA's strong federal policy favoring arbitration, and to clarify the meaning and intent of the language of the NASD Code of Arbitration, this Court should grant this petition for writ of certiorari.

I. The Decision of the Supreme Court of Alabama in This Case Is in Conflict with the Decisions of Four Federal Circuit Courts of Appeals as well as Numerous Other Decisions.

The Supreme Court of Alabama's overly broad interpretation of the "insurance business" exception directly conflicts with the decisions of at least four federal circuit courts of appeals. *See Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *In re Prudential Ins. Co.*, 133 F.3d 225 (3rd Cir.), *cert. denied* 119 S. Ct. 55 (1998); *Armjo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995); *Kidd v. Equitable Life Assurance Soc'y*, 32 F.3d 516 (11th Cir. 1994); *see also Metropolitan Life Ins. Co. v. McRae*, 121 F.3d 723 (11th Cir. 1997) (table of decisions without published opinions) (copy of unpublished decision is attached at Appendix C, page A16). Under the rationale of any of these federal circuit court decisions, Allmerica's motion to compel arbitration should have been granted.

The Third Circuit's decision in *In re Prudential Insurance Co.* concerned the plaintiffs' various state-law claims — "employment, contractual, and tortious in nature" — and federal RICO claims, all of which were based on "alleg[ations] that Prudential took adverse employment action against them in retaliation for their refusal to participate in the company's insurance sales fraud." *Prudential*, 133 F.3d at 227, 231. The court recognized that the plaintiffs' claims were undisputedly

employment related but also necessarily implicated "the legality of certain insurance practices" and "involve[d] Prudential's insurance business in the dispute." *Prudential,* 133 F.3d at 231.

The Third Circuit observed that the NASD Code and its drafting history were unclear as to the extent that insurance business must be involved in an employment dispute before the exception is triggered. *Prudential,* 133 F.3d at 233. The court concluded "[t]here is only one clear expression of intent [in the NASD Code]—that employment disputes are subject to arbitration while 'intrinsically insurance' claims are not." *Prudential,* 133 F.3d at 234. The court decided that based on the federal policy favoring arbitration, any doubts concerning the scope of the exception should be resolved in favor of arbitration and, therefore, reversed the district court's decision denying Prudential's motion to compel arbitration. *Prudential,* 133 F.3d at 234-35. This is in direct conflict with the decision of the Supreme Court of Alabama in the present case.

In fact, it is even more apparent in the present case than it was in *Prudential* that the insurance business exception does not prevent arbitration. The resolution of Miller's claims would not require the same type of extensive evaluation of Allmerica's insurance practices because Miller is not claiming, as were the plaintiffs in *Prudential,* that Allmerica committed insurance fraud on customers or violated any insurance laws. Rather, Miller is only claiming that Allmerica made misrepresentations to him concerning the continuation of certain client relationships and continuation of commissions.

The Eleventh Circuit's decision in *Kidd v. Equitable Life Assurance Society* also conflicts with the Supreme Court of Alabama's position. *Kidd* involved claims of race discrimination under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981. The plaintiffs had previously signed the Form U4 to register with the NASD to sell securities for defendant Equitable Life Assurance Society and an Equitable subsidiary. Equitable moved to compel arbitration of those claims but the district court denied the

motion. In interpreting both pre-1993 and post-1993 versions of the NASD Code section at issue in the present case, the Eleventh Circuit did not find that the "insurance business" exception applied, and it reversed the lower court's denial of arbitration. *Kidd*, 32 F.3d at 519-20. The Eleventh Circuit did not consider the fact that Equitable is an insurance company sufficient to trigger the exception. The court said that "Equitable's personnel practices do not constitute a dispute over its 'insurance business.'" *Kidd*, 32 F.3d at 519 n.5. Thus, *Kidd* is in conflict with the Supreme Court of Alabama's holding that "'the employment of insurance agents by an insurance company involves the insurance business of the insurance company'" and thereby invokes the "insurance business" exception of § 10101 of the NASD Code. (App. at A9 (quoting *Hagan*).)

The Eleventh Circuit has also decided at least one other case involving the "insurance business" exception. *Metropolitan Life Ins. Co. v. McRae*, 121 F.3d 723 (11th Cir. 1997) (table of decisions without published opinions) (copy of unpublished opinion attached at Appendix C, page A16).[4] *McRae*, an appeal from the Northern District of Alabama, is remarkably similar to the present case. In *McRae*, the defendant hired the plaintiffs to market a particular type of life insurance product, but approximately 18 months later, after the plaintiffs had obtained between 250 and 300 applications, the defendant discontinued the product and refunded all previously paid

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[4] Eleventh Circuit Rules permit citation of unpublished decisions. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not binding precedent. They may be cited as persuasive authority . . . ."). Additionally, a recent Eighth Circuit decision held that rules prohibiting the citation of unpublished opinions and stating that they are not binding precedent are unconstitutional as violations of Article III of the U.S. Constitution. *Anastasoff v. United States*, No. 99-3917EM, 2000 WL 1182813 (8th Cir. Aug. 22, 2000), *available at* http://www.ca8.uscourts.gov/opndir/00/08/993917P.pdf.

premiums. The plaintiffs filed a lawsuit alleging various types of fraud and breach of contract and sought "damages based on lost commissions and foregone business opportunities." Like Miller in the present case, the plaintiffs had signed Form U-4 agreements. The district court granted the defendant's motion to compel arbitration based on the NASD Code. The Eleventh Circuit affirmed, relying on *Kidd*, and held "that the insurance business exception is inapplicable to Appellants' dispute with MetLife, because the dispute arises out of their employment relationship with MetLife." (App. at A18.) Thus, *McRae* is also directly in conflict with the Supreme Court of Alabama's decision in the present case.

The Fifth Circuit's opinion in *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998), and the Tenth Circuit's opinion in *Armjo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995), are also contrary to the Supreme Court of Alabama's decision in this case. *Mouton* and *Armjo* both concern discrimination claims by former insurance sales agents. *Mouton*, 147 F.3d at 454; *Armjo*, 72 F.3d at 795. Both the Fifth and Tenth Circuits addressed the federal policy favoring arbitration and the history of the NASD Code. *Mouton*, 147 F.3d at 455-56; *Armjo*, 72 F.3d at 797-99. Both courts then rejected the contention that the plaintiffs' claims fell within the "insurance business" exception; instead, the courts found that the claims were employment related and therefore arbitrable under the NASD Code. *See Mouton*, 147 F.3d at 457 ("Mouton's Title VII claims involve Metropolitan's obligations as an employer rather than an insurer."); *Armjo*, 72 F.3d at 800 ("[T]he dispute as framed by the Plaintiffs is predicated upon the civil rights laws, not the insurance laws, and they are predicated on Prudential's role as an employer rather than as an insurer."). Moreover, unlike the Supreme Court of Alabama, the Fifth and Tenth Circuits correctly recognized that an expansive interpretation of the exception renders any agreement to arbitrate pursuant to the NASD Code meaningless to insurance companies. *Id.* A construction rendering an

arbitration provision meaningless violates the FAA and cases construing the FAA. Thus, the Supreme Court of Alabama's decision in the present case is in conflict with decisions of the Third, Fifth, Tenth, and Eleventh circuits.

The Supreme Court of Alabama's decision is also in conflict with numerous federal district court decisions and some other state court decisions. These decisions demonstrate both that the issue raised by Allmerica is common and that the resolution of the issue by the Supreme Court of Alabama is erroneous. Conflicting decisions of federal district courts or other state courts include the following 18 cases: *Paul Revere Variable Annuity Ins. Co. v. Zang*, 81 F. Supp. 2d 227 (D. Mass. 2000) (involving claims of employees terminated after a merger and specifically disagreeing with the Supreme Court of Alabama's decision in *Hagan*); *Brannon v. Massachusetts Mut. Life Ins. Co.*, No. CIV A. 99-3497, 2000 WL 122241 (E.D. La. Jan. 31, 2000) (involving an employee's claim for disability insurance, specifically disagreeing with *Hagan*, and stating that "a case which simply involves an insurance company in an employment dispute does not trigger the [insurance business] exception"); *Paul Revere Variable Annuity Ins. Co. v. Thomas*, 66 F. Supp. 2d 217 (D. Mass. 1999) (concerning claims by employees terminated after a merger and stating that that *Hagan* "is inapposite to the extensive authority reaching the opposite conclusion"); *Palmer-Scopetta v. Metropolitan Life Ins. Co.*, 37 F. Supp. 2d 1364 (S.D. Fla. 1999) (determining that the plaintiff's sexual harassment claims concerned MetLife's "'role as an employer rather than as an insurer'" and, as such, held that those claims did not fall within the "insurance business" exception); *Herko v. Metropolitan Life Ins. Co.*, 978 F. Supp. 141 (W.D. N.Y. 1997) (holding that insurer's former employee's Title VII claims were due to be arbitrated); *Battle v. Prudential Ins. Co.*, 973 F. Supp. 861 (D. Minn. 1997) ("That the facts underlying the Plaintiff's claims may involve allegations of insurance practices, does not bring Plaintiff's claims within the insurance exception."); *Jankausas v.*

Prudential Ins. Co., No. Civ. A. 97-985, 1997 WL 241143 (E.D. Pa. May 6, 1997) ("Breach of an employment agreement . . . and failure to pay wages are paradigm employment concerns, no matter how much insurance Prudential may sell or how it may sell it."); *Cular v. Metropolitan Life Ins. Co.*, 961 F. Supp. 550 (N.D. N.Y. 1997) (compelling arbitration of employment-related claims); *Neary v. Prudential Ins. Co.*, No. 3:96CV1513 (AHN), 1997 WL 114789 (D. Conn. February 24, 1997) (holding that the "insurance business" exception failed to apply); *Vitone v. Metropolitan Life Ins. Co.*, 943 F. Supp. 192 (D. R.I. 1996) ("[T]he main thrust of this claim is to challenge a negative employment decision and other conduct during the employment relationship, not to examine MetLife's insurance practices."); *Weinstein v. Equitable Life Assurance Soc'y*, No. CIV. A. 96-CV-3614, 1996 WL 557321 (E.D. Pa. Sept. 26, 1996) ("Courts have held that the insurance business exception does not apply to employment-related disputes merely because the dispute involves an insurance company."); *Pitter v. Prudential Life Ins. Co.*, 906 F. Supp. 130 (E.D. N.Y. 1995) (compelling arbitration of plaintiff's Title VII and § 1981 claims); *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282 (N.D. Ill. 1995), *clarified by* 916 F. Supp. 729 (N.D. Ill. 1996) (holding that plaintiff's claims for conspiracy and intentional interference with business practices were due to be arbitrated); *Hall v. MetLife Res.*, No. 94 Civ. 0358 (JFK), 1995 WL 258061 (S.D. N.Y. May 3, 1995) ("Courts have consistently held that claims arising out of an employment relationship . . . are within the scope of the Form U-4 and the NASD arbitration provision."); *Trumbetta v. Metropolitan Life Ins. Co.*, Civ. A. No. 94-3275, 1994 WL 481152 (E.D. Pa. 1994) ("This is not a claim arising from a dispute about the insurance aspect of MetLife's business."); *Prudential Ins. Co. v. Shammas*, 865 F. Supp. 429 (W.D. Mich. 1993) ("The conduct complained of had nothing to do with the insurance aspect of Prudential's insurance business."); *Northwestern Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339 (Ind. Ct. App. 1998)

("Stinnett's claims ultimately involve significant aspects of the employment relationship and resolution depends on the parties broker-employer relationship."); *Fastenberg v. Prudential Ins. Co.*, 707 A.2d 209 (N.J. Super. Ct. App. Div. 1998) (compelling arbitration of employee's wrongful discharge and defamation claims).

The majority of the Supreme Court of Alabama cited most of these cases in their opinion in the present case but stated merely that "[w]e are not persuaded that we should overrule *Hagan*." Apparently, only a ruling from this Court will persuade them of their error. Therefore, this Court should grant this petition for writ of certiorari.

II. The Supreme Court of Alabama's Decision Conflicts with This Court's Interpretation of the Federal Arbitration Act as Establishing a Broad Federal Policy Favoring Arbitration.

Section 2 of the FAA codifies the federal policy favoring the enforcement of arbitration agreements:

> A written provision in any . . . contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid irrevocable, and enforceable . . . ."

9 U.S.C. § 2. This Court has specifically found that with the passage of the FAA, Congress "intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements" and create "a substantive rule applicable in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (holding that FAA preempted California state law); *accord Terminix*, 513 U.S. at 271-72. The very "purpose

of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Terminix*, 513 U.S. at 270.

In interpreting the language and congressional intent of the FAA, this Court has consistently determined that the Act "establishes a federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). One of the cardinal principles of interpretation of the FAA is that any doubts concerning the scope of arbitration must be resolved in favor of arbitration.

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration .... **The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.**

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)) (emphasis added); *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (holding that ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration). This Court also has emphasized that "'[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of*

Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

However, the Supreme Court of Alabama's decision in the present case appears to ignore this federal policy by interpreting the "insurance business" exception contained in § 10101 of the NASD Code in an overly broad manner. Even if the Supreme Court of Alabama found that the NASD Code was ambiguous as to whether disputes between insurance company NASD members and their employees were due to be arbitrated, it was required, as a matter of federal law, to resolve any doubts concerning the scope of the arbitrable issues in favor of arbitration. *Mitsubishi Motors Corp.*, 473 U.S. at 626.

Therefore, the Supreme Court of Alabama's decision in the present case has failed to abide by this Court's precedents by rejecting the federal policy underlying the FAA. This Court should grant this petition for writ of certiorari to effectuate the FAA's strong federal policy favoring arbitration and this Court's precedents recognizing that policy.

III. A Uniform Interpretation of the NASD Code of Arbitration Procedure Is Imperative.

A. The Supreme Court of Alabama's decision will cause different outcomes in similar cases solely dependent upon the court in which the case is pending — a result which is contrary to the intent of the FAA.

This Court has examined the legislative intent of the FAA and "decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Terminix*, 513 U.S. at 272 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984)). The Supreme Court of Alabama's decision in the present case, which is contrary to the decisions of a majority of federal circuit

courts of appeals as well as numerous other courts, violates this Court's finding concerning the intent of the FAA.

That Alabama is within one of the federal circuits that has addressed this issue (the Eleventh) and reached a decision that is in conflict with the Supreme Court of Alabama's decision in this case makes the decision in the present case especially problematic. If the Supreme Court of Alabama's decision is allowed to stand, whether employment disputes arising in Alabama between employees who signed U-4 Forms and NASD members who are also insurance companies will be required to be arbitrated depends on whether the action is pending in an Alabama state court or an Alabama federal court. Such a result will only encourage forum shopping by both plaintiffs and defendants. Whether a case is arbitrated will be determined by whether there is complete diversity and more than $75,000 in controversy or whether there is a federal issue involved.

In fact, but for the naming of a non-diverse defendant (*i.e.*, Nowlin), the present case could have been removed to federal court where, under the Eleventh Circuit precedents of *Kidd* and *McRae*, arbitration would already have been compelled. Whether an arbitration provision is enforced should not depend on these kinds of factors. Instead, this Court should alleviate this disparity and effectuate the intent of the FAA by overruling the Supreme Court of Alabama's overly broad interpretation of the "insurance business" exception of the NASD Code.

B. The Supreme Court of Alabama's decision conflicts with the NASD's national arbitration policy, the language of the NASD Code of Arbitration Procedure, and its drafting history.

The NASD was established under the authority of the 1938 Maloney Act Amendments to the Securities and Exchange Act of 1934. 52 Stat. 1070, 15 U.S.C. § 78*o*-3; *International Ass'n*

of Machinists v. Street, 367 U.S. 740, 809 n.16 (1961); NASD Manual, Administration (CCH) 151 (1996). The NASD operates subject to oversight by the Securities and Exchange Commission ("SEC"). *Id.* The SEC must approve any rule change by the NASD, and the SEC has authority to "'abrogate, add to, and delete from'" the rules in the NASD Code. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233-36 (1987). As such, the SEC has virtually plenary authority over the arbitration rules adopted by the NASD. *See id.*

The NASD first adopted a Code of Arbitration Procedure in 1968. *Financial House, Inc. v. Otten*, 369 F. Supp. 105, 106-07 (E.D. Mich. 1973). On October 18, 1979, the NASD filed with the SEC a proposed rule change to be incorporated in its Code of Arbitration Procedure. NASD Proposed Rule Change, 44 Fed. Reg. 75255 (proposed Oct. 18, 1979). Before the rule change, disputes had to be "securities related" in order to be arbitrable. *Id.* However, under the proposal which was adopted in 1980, the "securities related" requirement was removed. The NASD noted:

> **The phrase "securities related" has been deleted before "dispute," [in § 10101,] so that any dispute, claim or controversy arising out of or in connection with the business of any member may now be arbitrated.** This change, which was made to conform to the uniform code, will make arbitrable certain disputes involving a member's business which were not previously eligible for arbitration.

44 Fed. Reg. at 75255 (emphasis added); *see* Securities Exchange Act of 1934 Release No. 34-16860, 1980 WL 27003 (S.E.C.) (May 30, 1980) (approving proposed rule change).

The Supreme Court of Alabama's decision in the present case and in *Hagan* held that § 10101 of the NASD Code "is

intended to require arbitration of disputes regarding the securities business of its members." (App. at A6 (quoting *Hagan*).) However, the aforementioned amendment makes clear that disputes are subject to arbitration under § 10101 regardless of whether they are securities related.

The 1980 rule change also "added an exception [to § 10101] which would exclude from arbitration 'disputes involving the insurance business of any member which is also an insurance company.'" 44 Fed. Reg. at 75255. The NASD expressed that its rationale for creating this "insurance business" exception was to avoid arbitrating "insurance-only" and "intrinsically insurance" disputes, stating:

> [T]he number of **insurance-only** claims involving insurance companies is so disproportionately large in relation to their securities business that to include such claims would unduly burden the arbitration system. In addition, the inclusion of such claims could result in a requirement to arbitrate matters that are **intrinsically insurance** . . . .

44 Fed. Reg. at 75255 (emphasis added).

In 1987, the NASD proposed another rule change which recognized that the NASD Code required arbitration of employment disputes. Proposed Rule Change by NASD Relating to Amendments to Code of Arbitration Procedure, 52 Fed. Reg. 9232 (proposed March 5, 1987). The change precluded NASD members from requiring associated persons to waive their right to arbitration. *Id.* The NASD's concern was that such waivers "would have the effect of denying registered representative access to the NASD's arbitration facilities in case of an **employment dispute** between them and a member firm . . . ." *Id.* (emphasis added).

Although the NASD recognized the arbitrability of employment disputes in 1987, it actually amended the NASD

Code in 1993 to reflect the scope of that arbitrability.[5] After the 1993 amendment, §§ 10101 and 10201 of the NASD Code specifically allow for arbitration of disputes "arising out of the employment or termination of employment of associated persons with any member."[6]

Section 10202, which involves the composition of arbitration panels, was also amended in 1993. 58 Fed. Reg. at 45932. That provision limits the composition of arbitration panels "[i]n disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions." *Id.*

The only federal circuit court decision to hold that employment disputes were not due to be arbitrated is the Seventh Circuit's decision in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), which interpreted a pre-1993 version of the NASD Code. This case prompted the 1993 amendment to the NASD Code to clarify that employment disputes were required to be arbitrated under the NASD Code. In its Order Approving Proposed Rule Change Relating to the Scope of NASD Code, 58 Fed. Reg. 45932 (Aug. 25, 1993), the NASD cited *Farrand* as one of the factors prompting the rule change. The change was intended "to clarify that disputes, claims, or controversies arising out of the employment or

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[5] *See* Proposed Rule Change by NASD Relating to Enforcement of Arbitrators' Orders Under the NASD Code, 58 Fed. Reg. 39070 (proposed June 11, 1993); Order Approving Proposed Rule Change Relating to the Scope of the NASD Code, 58 Fed. Reg. 45932 (Aug. 25, 1993).

[6] It is undisputed that the 1993 amended versions of § 10101 and § 10201, rather than any earlier versions of those sections, are the NASD Code provisions applicable for determining the arbitrability of Miller's claims in the present case.

termination of employment of an associated person are eligible for submission to arbitration" and "to ensure that the arbitration of industry employment disputes may be compelled at the instance of one of the parties to the dispute." 58 Fed. Reg. at 45932. The Eleventh Circuit in *Kidd* was also critical of the Seventh Circuit's analysis in *Farrand,* stating that the Seventh Circuit acknowledged that it was not unreasonable to interpret the pre-amendment NASD Code to require arbitration of employment disputes and not to do so was contrary to this Court's admonition in *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S.1,24-25 (1983), that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Kidd,* 32 F.3d at 519 & n.6. The Eleventh Circuit was also critical of the Seventh Circuit's construction of the pre-1993 NASD Code's language. *Id.* at 519-20.

Based on the rejection of *Farrand* and on these amendments and related filings by the NASD in 1980, 1987, and 1993, the NASD specifically expressed its intent that employment disputes are to be arbitrable, while disputes that are intrinsically about insurance are excepted from arbitration. However, the decisions of the Supreme Court of Alabama in the present case and in *Hagan* negate this intention. The Supreme Court of Alabama concluded that "the [insurance business] exception of § 10101 applies to members who are insurance companies." (App. at A6.) Under that holding, the mere fact that a dispute involves an insurance company will automatically preclude arbitration. In short, according the Supreme Court of Alabama, NASD member insurance companies will be unable to arbitrate disputes with their employees who are associated persons. This is totally inconsistent with the NASD's clearly stated rationale for the "insurance business" exception, *i.e.*, not arbitrating "insurance-only" and "intrinsically insurance" disputes.

It is evident that the dispute in the present case is not an "intrinsically insurance" dispute. Miller's claims simply are based on his employment contract and alleged oral promises

and representations about terms of his employment and compensation. Miller's claims are employment related and fall squarely within the parameters of disputes arbitrable under § 10101 and § 10201 of the NASD Code.

The amendment to § 10202 of the NASD Code also supports this conclusion. That provision implicitly recognizes that "disputes involving **employment contracts**, promissory notes or receipt of commissions" are arbitrable. NASD Code § 10202 (emphasis added). Miller contends that Allmerica breached his employment contract. Miller also claims that in relying upon representations regarding his sales, he lost customers and commissions. Even though § 10202 is not directly at issue in this case, the language contained therein demonstrates that the NASD recognizes that claims like Miller's are arbitrable.

In sum, the Supreme Court of Alabama's decision in the present case is inconsistent with the NASD's national rules on arbitration and the drafting history of those rules. That decision undermines a national, uniform interpretation and application of the NASD's arbitration rules and policy. This Court should grant this petition for certiorari to clarify the proper interpretation of the NASD Code of Arbitration Procedure's insurance business exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KIMBERLY R. WEST, ESQ.
*MICHAEL L. JACKSON, ESQ.
MARK M. HOGEWOOD, ESQ.
Wallace, Jordan, Ratliff
& Brandt, L.L.C.
P.O. Box 530910
Birmingham, Alabama 35253
Voice: (205) 870-0555
Fax: (205) 871-7534

Attorneys for Petitioner

*Counsel of Record

APPENDIX A

REL:06/23/2000 ALLMERICA V.MILLER

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1980529

Allmerica Financial Life Insurance and Annuity Company

v.

William A. Miller

1980530

Nowlin & Associates

v.

William A. Miller

Appeals from Jefferson Circuit Court
(CV-97-5389)

HOUSTON, Justice.[1]

William A. Miller was employed, through Nowlin & Associates, as an agent for Allmerica Financial Life Insurance and Annuity Company ("Allmerica").[2] Allmerica is a member of the National Association of Securities Dealers ("NASD"); Nowlin & Associates is not a member of NASD. Miller sued Allmerica and Nowlin & Associates, alleging various wrongs arising out of the terms of his employment. Specifically, Miller's complaint alleged that he had become a top seller of an insurance product called Payroll Exceptional Life ("PEL"); that he had been promised vested commissions for selling the PEL; that Allmerica had sold the PEL product line to American Hermitage Life Insurance Company; and that by selling the PEL product line Allmerica had severed Miller's vested commissions. These allegations constituted the factual basis of his seven-count complaint.[3]

Allmerica and Nowlin & Associates asked the trial court to compel arbitration of Miller's claims, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The underlying

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[1] This case was originally assigned to another Justice on this Court; it was reassigned to Justice Houston on April 21, 2000.

[2] When Miller entered into the "Career Agent's Agreement," Allmerica was known as SMA Life Assurance Company.

[3] Count 1 alleged breach of contract; Count 2 alleged deceit; Count 3 alleged misrepresentation or suppression; Count 4 alleged negligent, reckless, wanton, and/or wrongful behavior; Count 5 alleged fraudulent deceit; Count 6 alleged suppression of a material fact; and Count 7 alleged intentional interference with Miller's business.

arbitration agreement is found in the application Miller signed to become a registered securities agent; that application is styled "Uniform Application for Securities Industry Registration or Transfer" ("Form U-4"). Form U-4 requires Miller to arbitrate "any disputes, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of [NASD]." However, § 10101 of the NASD Code of Arbitration[4] excepts from arbitration matters involving "the insurance business of any member who is also an insurance company." Relying on our decision in *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998), the trial court refused to compel arbitration. In *Hagan* we held that a lawsuit filed by an insurance agent with claims factually similar to Miller's involved the "insurance business" and fell within the exception to § 10101.[5] By so holding, we overturned the trial court's order compelling arbitration.

The significant issues in these appeals are (1) whether the trial court correctly concluded that Miller's claims are excepted by § 10101 of the NASD Code, as defined in *Hagan*, and, if so, (2) whether *Hagan* should be overruled on the ground that it makes too broad an interpretation of § 10101. Before we address those two issues, however, we must consider whether Allmerica and Nowlin & Associates have standing to enforce the arbitration clause found in Form U-4.

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[4] This code was adopted by NASD pursuant to Art. VII, § 1(a)(3) of its bylaws.

[5] In *Hagan*, the insurance agent's complaint alleged libel, fraud in the inducement, fraudulent concealment, and breach of contract against three companies that had hired him to sell insurance policies and that had subsequently terminated his employment.

Nowlin & Associates is not a member of NASD.[6] To determine what legal effect its nonmembership has on its demand for arbitration, we must look to the NASD Code of Arbitration. Section 10101 of that Code, "Matters Eligible for Submission," provides for the arbitration of:

> "any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> "(a) between or among members;
>
> "(b) between or among members and associated persons;
>
> [and]
>
> "(c) between or among members or associated persons and public customers, or others...."

In *Hagan*, we considered whether a nonmember corporation, like Nowlin & Associates, could be a "person associated with a member":

> "A 'person associated with a member' or an 'associated person of a member' is defined as

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[6] Nowlin & Associates has never filed a Form U-4 to become a member of NASD. The record indicates that Charles Nowlin, as an individual, has filed a Form U-4, but that Nowlin & Associates, a separate legal entity, has not filed a Form U-4.

> "'every sole proprietor, partner, officer, director, or branch manager of any member [of the NASD], or any natural person occupying a similar status or performing similar functions, or any natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by such member, whether or not any such person is registered or exempt from registration with the [NASD] pursuant to these By-Laws.'
>
> "NASD Bylaws, Art. I, ¶ q. Under this definition, only a natural person is an 'associated person of a member.' Because [the nonmember corporation] is not a natural person, it is not an 'associated person of a member.'"

Ex Parte Hagan, 721 So. 2d at 169. Nowlin & Associates is not a member; it is not a person associated with a member; and it is not an associated person of a member; therefore, it does not have standing to compel arbitration. We affirm the trial court's refusal to compel arbitration of the dispute between Miller and Nowlin & Associates.

Unlike Nowlin & Associates, Allmerica is a registered member of NASD. Therefore, under the rules cited above, Allmerica has standing to enforce the arbitration agreement, provided the matter to be arbitrated does not fall within the exception found in § 10101. See *SouthTrust Securities, Inc. v. McClellan*, 730 So. 2d 620 (Ala. 1999) (compelling arbitration under the FAA and the NASD Code of Arbitration when the

plaintiff had signed a Form U-4).[7] This brings us to the first issue stated earlier: Is the underlying dispute a matter involving Allmerica's insurance business and thus excepted from the arbitration provision?

In *Hagan*, we answered a similar question by holding that the exception of § 10101 applies to members who are insurance companies. 721 So. 2d at 171 (holding that the "exception applies because of Minnesota Mutual's status as an insurance company"). We based this holding on the following rationale:

> "It seems clear that the purpose of the exception is to exclude disputes involving the business of insurance as distinguished from those involving the sale of securities. A plain reading of § 10101 of the Code of Arbitration of the National Association of Securities Dealers is that it is intended to require arbitration of disputes regarding the securities business of its members. It is reasonable to conclude that securities regulations apply only to the securities business, and not to the insurance business. Indeed, the insurance business is commonly exempted from laws that regulate other businesses and industries. *See, e.g.*, the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which provides in part: 'No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance.' Similarly, the NASD, in adopting its Code of Arbitration, was careful to except disputes involving the insurance business, which is not within the field of operation of the NASD.

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[7] *SouthTrust Securities* did not involve the insurance exception.

"We are aware that some courts have otherwise construed § 10101 or its similarly worded predecessors. However, some of the cases relied on by the defendants have applied a Form U-4 arbitration to a dispute with an insurance company without even mentioning the exception to § 10101. *Hermes v. Prudential Ins. & Fin. Services*, 109 Ohio App. 3d 309, 671 N.E.2d 1384 (1996); *Gerga v. The Prudential Ins. Co. of America, d/b/a Prudential Ins. & Fin. Services*, No. 96-12932, (Hennepin County, Minn., District Court, Feb. 10, 1997) (copy provided in Minnesota Mutual's brief, at app. C); *Tom v. The Minnesota Mut. Life Ins. Co.*, No. CC-95-1805 (Hawaii Circuit Ct., 1st Cir., March 19, 1997) (copy provided in Minnesota Mutual's brief, at app. D).

"We find unpersuasive the reasoning of the cases that have discussed the exception to § 10101 and held that it did not apply to the claims at issue. In *Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 795 (10th Cir. 1995), the three plaintiffs 'primarily sold insurance policies, but also sold mutual funds through Pruco Securities Corporation,' a wholly owned subsidiary of Prudential Insurance Company. The plaintiffs filed claims in a federal court alleging that their employment had been terminated based on their race, sex, or national origin. The Court of Appeals for the Tenth Circuit rejected their argument for application of the exception to the NASD provision that is now § 10101:

> "'Although Prudential is an insurance company, there is nothing unique about these discrimination claims by Plaintiffs that involve the "insurance business" of Prudential. Plaintiffs are simply alleging

that they were wrongfully discriminated against as employees in violation of [federal and state laws]. Illegal employment discrimination, if it exists, involves an employer's statutory obligations as an employer rather than as an insurer. Admittedly, Prudential's explanation for its actions against these Plaintiffs is that, in part, they replaced one Prudential policy with another or knowingly sold a policy based on a false application form. However, the dispute as framed by the Plaintiffs is predicated on the civil rights laws, not the insurance laws, and they are predicated on Prudential's role as an employer rather than as an insurer.

"'If Section [10101] of the NASD Code were construed to exclude from arbitration any employment dispute that arises within the context of insurance employment, it would render the arbitration language in these Plaintiffs' Forms U-4 illusory. Once again, our obligation is to reconcile and to give meaning to all provisions of the parties' contracts. Our obligation to construe arbitration clauses broadly compels us to construe this exception to the arbitration clause narrowly. Thus, we conclude that the insurance exception to arbitrability does not include an exception for ordinary employment disputes merely because the defendant employer is an insurance company.'

"We see nothing in the exception that requires application of insurance laws before the exception is triggered; rather, the exception plainly states that the arbitration clause does not apply to 'disputes involving the insurance business of any member which is also an insurance company.' What could be more crucial to the insurance business than the employment of agents to sell insurance? We respectfully disagree with the Tenth Circuit's conclusion that enforcing § 10101's exception in its own terms renders Form U-4's arbitration clause 'illusory.' Rather, we read the arbitration clause in Form U-4 as applying to applicants for securities registration so as to provide for arbitration of disputes that are 'required to be arbitrated under the rules, constitutions, or by-laws of' the relevant securities association. The Code of Arbitration of the NASD does not require arbitration of disputes concerning the insurance business of an association member that is an insurer as well as a securities firm. Surely the employment of insurance agents by an insurance company involves the insurance business of the insurance company.

"Similar results, for similar reasons, were reached by federal district courts in *Battle v. Prudential Ins. Co. of America*, 973 F. Supp. 861, 868-69 (D. Minn. 1997) ('To trigger the insurance exception, the plaintiff must allege unlawful insurance practices, and not wrongful conduct directed at the plaintiff,' citing *Pitter v. Prudential Life Ins. Co. of America*, 906 F. Supp. 130 (E.D.N.Y. 1995)); *Cular v. Metropolitan Life Ins. Co.*, 961 F. Supp. 550, 558 (S.D.N.Y. 1997) (complaint not within the exception because it 'does not raise complex insurance law questions'); *Prudential Ins. Co. of America v.*

Shammas, 865 F. Supp. 429, 432 (W.D. Mich. 1993) ('The allegations in the complaint all concern alleged conduct toward Mr. Shammas by other employees and other people. The conduct complained of had nothing specifically to do with the insurance aspect of Prudential's business.'); and *Foley v. Presbyterian Ministers' Fund*, (No. 90-1053, E.D. Pa., March 19, 1992) (dispute 'arises out of the Fund's personnel practices, not its "insurance business"').

"We respectfully disagree with the conclusions reached by those courts. It seems that those courts are grafting onto § 10101's exception a requirement that, in addition to 'involving the insurance business of a member that is also an insurance company,' the claims at issue must involve only questions of insurance law, or even 'complex' questions of insurance law. In our view, the exception, in its plain terms, simply excepts disputes involving the insurance business of insurance companies from the arbitration clause that applies to the securities business of securities companies. The dispute before us involves the insurance business of Minnesota Mutual, an insurance company, and the actions of its general agent, Sizemore, through his company, Paragon, in the furtherance of that insurance business."

Ex parte Hagan, 721 So. 2d 167, at 171-73 (Ala. 1998). (Footnotes omitted.) (Emphasis omitted.) Based on this Court's decision in *Hagan*, we hold that Miller's claims involve the insurance business of Allmerica; that the claims fall under the exception stated in § 10101; that the trial court correctly relied on precedent from this Court; and, therefore, that the judgment of the trial court is due to be affirmed.

Allmerica recognizes the precedent of *Hagan*, but asks us to overturn it, based upon the following cases: *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *In re Prudential Ins. Co. of America Sales Practice Litigation All Agent Actions*, 133 F.3d 225 (3d Cir.), *cert. denied sub nom. Weaver v. Prudential Ins. Co. of America*, 524 U.S. 817 (1998); *Armjo v. Prudential Ins. Co. of America*, 72 F.3d 793 (10th Cir. 1995); *Kidd v. Equitable Life Assurance Soc'y of the United States*, 32 F.3d 516 (11th Cir. 1994); *Paul Revere Variable Annuity Ins. Co. v. Zang*, 81 F. Supp. 2d 227 (D. Mass. 2000); *Brannon v. Massachusetts Mut. Life Ins. Co.*, No. CIV A. 99-3497 (E.D. La., Jan. 31, 2000) (not published in F. Supp.); *Paul Revere Variable Annuity Ins. Co. v. Thomas*, 66 F. Supp. 2d 217 (D. Mass. 1999); *Palmer-Scopetta v. Metropolitan Life Ins. Co.*, 37 F. Supp. 2d 1364 (S.D. Fla. 1999); *Herko v. Metropolitan Life Ins. Co.*, 978 F. Supp. 141 (W.D.N.Y. 1997); *Battle v. Prudential Ins. Co.*, 973 F. Supp. 861 (D. Minn. 1997); *Jankauskas v. Prudential Ins. Co. of America*, No. Civ. A. 97-985 (E.D. Pa., May 6, 1997) (not published in F. Supp.); *Cular v. Metropolitan Life Ins. Co.*, 961 F. Supp. 550 (N.D.N.Y. 1997); *Neary v. Prudential Ins. Co. of America*, No. 3:96CV1513 (D. Conn., Feb. 24, 1997) (not published in F. Supp.); *Vitone v. Metropolitan Life Ins. Co.*, 943 F. Supp. 192 (D.R.I. 1996); *Weinstein v. Equitable Life Assurance Soc'y of the United States*, No. CIV. A. 96-CV-3614 (E.D. Pa., Sept. 26, 1996) (not published in F. Supp.); *Pitter v. Prudential Life Ins. Co.*, 906 F. Supp. 130 (E.D.N.Y. 1995); *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282 (N.D. Ill. 1995), *clarified by* 916 F. Supp. 729 (N.D. Ill. 1996); *Hall v. MetLife Resources*, No. 94 Civ. 0358 (S.D.N.Y., May 3, 1995) (not published in F. Supp.); *Trumbetta v. Metropolitan Life Ins. Co.*, Civ. A. No. 94-3275 (E.D. Pa., 1994) (not published in F. Supp.); *Prudential Ins. Co. Shammas*, 865 F. Supp. 429 (W.D. Mich. 1993); *Northwestern Mut. Life Ins. Co. v. Stinnet*, 698 N.E.2d 339 (Ind. Ct. App. 1998); *Fastenberg v. Prudential Ins.*

Co. of America, 309 N.J. Super. 415, 707 A.2d 209 (App. Div. 1998).

We are not persuaded that we should overrule *Hagan*.

AFFIRMED.

Cook, Lyons, Brown, Johnstone, and England, JJ., concur.

Hooper, C.J., and Maddox and See, JJ., concur in part and dissent in part.

SEE, Justice (concurring in part and dissenting in part).

I concur in the affirmance of the trial court's order denying Nowlin & Associates' motion to compel arbitration. I dissent from the affirmance of the trial court's order denying Allmerica Financial Life Insurance and Annuity Company's motion to compel arbitration.

In denying Allmerica's motion to compel arbitration, the trial court relied on *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998). In *Hagan*, this Court held that an employment dispute with an insurance company necessarily involves the insurance business of that company and therefore comes within the insurance business exception under § 10101 of the Code of Arbitration of the National Association of Securities Dealers. The holding of *Hagan* is contrary to the clear majority of cases, as cited in the main opinion.[8] I would overrule *Hagan* and, in

---

[8] As one of the authorities cited in the main opinion states: "The fact that [the defendant] is an insurance company does not automatically mean that a dispute involves its 'insurance business.' To the contrary, courts have almost universally held that being employed by an insurance company is not enough to trigger the exception and instead examine the degree to which the pending claim

(continued...)

accordance with the clear majority of authority, hold that plaintiff William A. Miller's employment dispute with Allamerica does not involve the business of insurance and is therefore arbitrable. Accordingly, I dissent.

Hooper, C.J., and Maddox, J., concur.

---

[8] (...continued)
is entangled with the company's insurance business." *Paul Revere Variable Annuity Ins. Co. v. Thomas*, 66 F. Supp. 2d 217, 228 (D. Mass. 1999) (citations omitted).

APPENDIX B

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

Filed in Open Court
THIS 27 day of Oct 1998
POLLY CONRADI
CLERK CIRCUIT COURT
By /s/ rc
DEPUTY CLERK

WILLIAM A. MILLER,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	
ALLMERICA FINANCIAL LIFE INSURANCE AND ANNUITY COMPANY, et al.,	)	CV 97-5389 ER
	)	
Defendant(s).	)	

ORDER

This matter is before the Court on defendants' Motion to Compel Arbitration.

Defendants contend that plaintiff signed a Form U-4 to register as a agent for securities and agreed to arbitrate any dispute arising out of his employment relationship.

Plaintiff contends this action does not arise out of his employment and that actions involving insurance business are excepted from the arbitration provision.

In *Hagan v. Minnesota Mutual Life Ins. Co.*, 1998 WL 96550, it was held that disputes involving the insurance business of any member are expressly excepted.

It does not appear that the sale of securities is involved in this case. Therefore, defendants' Motion to Compel Arbitration is denied.

Done this 27 day of October, 1998.

/s/ Edward L. Ramsey
CIRCUIT JUDGE

COPIES TO:

Mr. David H. Marsh
Two Chase Corporate Drive, Suite 460
Birmingham, AL 35244

Mr. R. Dale Wallace, Jr.
P.O. Box 530910
Birmingham, AL 35253

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-7051
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
JUL 31 1997
MIGUEL J. CORTEZ
CLERK

D. C. Docket No. CV-95-B-2900-S

METROPOLITAN LIFE INSURANCE COMPANY, INC.,

Plaintiff-Appellee,

versus

GERALD W. MCRAE, MICHAEL A. VON KANEL,
D. BRETT MCEWEN, STEPHEN TROWBRIDGE,
and STEVE WHITE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(July 31, 1997)

Before TJOFLAT, COX AND CARVES, Circuit Judges.

PER CURIAM:

Gerald W. McRae, Michael A. Von Kanel, D. Brett McEwen Stephen Trowbridge, and Steve White ("Appellants") challenge the district court's order compelling arbitration and dismissing Appellants' claims against Metropolitan Life Insurance Company Inc. ("MetLife") . We affirm

I. BACKGROUND

In early 1994, MetLife recruited the Appellants to work on the "Century 21 Program" to market a particular type of life insurance policy. Almost a year and a half later, after the Appellants obtained between 250 and 300 policy applications, MetLife discontinued the Century 21 Program, refunding all previously paid premiums and refusing to accept premiums accompanying applications relating to the Century 21 Program. After that, Appellants filed a lawsuit against MetLife alleging various types of fraud breach of contract. Appellants; sought damages based on lost commissions and foregone business opportunities.

MetLife filed a motion to compel arbitration, because Appellants had each signed the Uniform Application for Securities Industry Registration and Transfer ("Form U-4") as a condition of employment with the Century 21 Program. The National Association of Securities Dealers Code ("NASD Code" governs the Form U-4 requires arbitration of disputes between member firms of the NASD and associated persons arising out of the employment or termination of employment of such associated persons. *See* NASD Code, Rule 10101. The district court granted MetLife's motion to compel arbitration and dismissed the Appellants' claims with prejudice.

II. DISCUSSION

Appellants concede that the arbitration agreement contained in the Form U-4, including the agreement to arbitrate employment disputes, is enforceable under the Federal Arbitration Act. *See Kidd v. Equitable Life Assr. Soc.* 32 F.3d 516, 519-20 (11th Cir. 1994). Appellants also concede that *Kidd* precludes the application of the "insurance business exception" to employment disputes. *See id.* at 519. According to the text of the NASD Code, the insurance business exception applies only to disputes, which arise out of insurance business, between (1) NASD members or (2) "NASD members and public customers or others." NASD Code Pt. 1, § 1. The *Kidd* Court held that an employee is not an "other" within the scope of § 1 of the NASD Code and concluded that employment disputes were not subject to the insurance business exception. *See Kidd,* 32 F.3d at 519-20.

Nevertheless, Appellants urge us to "revisit" our analysis in *Kidd* and follow the decision of a district court in New Jersey in applying the insurance business exception to employment disputes. *In re Prudential Ins. Co.,* 924 F. Supp 627 (D.N.J. 1996). The opinions of prior panels bind this court unless the prior opinion is overruled by this Court sitting en banc or by the Supreme Court. *Vann v. Citicorp Saving of New York,* 891 F.2d 1507, 1509 n. 2 (11th Cir. 1990); *Bonner v. City of Prichard,* 661 F. 2d 1206 (11th Cir. 1981) (en banc). As neither the en banc Court nor the Supreme Court has overruled, its holding remains binding precedent. Accordingly, we hold that the insurance business exception is inapplicable to Appellants' dispute with MetLife, because dispute arises out of their employment relationship with MetLife.

III. CONCLUSION

For the foregoing reason, the judgment of the district court is AFFIRMED.

(2)

No. 00-457

Supreme Court, U.S.
FILED
OCT 20 2000
CLERK

IN THE

Supreme Court of the United States

ALLMERICA FINANCIAL LIFE INSURANCE AND ANNUITY COMPANY,

Petitioner,

v.

WILLIAM A. MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

BRIEF IN OPPOSITION

DAVID HALL MARSH
Counsel of Record
THOMAS MARSHALL POWELL
MARSH, RICKARD & BRYAN, P.C.
Attorneys for Respondent
800 Shades Creek Parkway
Suite 600-D
Birmingham, Alabama 35209
(205) 879-1981

162967

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) 10

In re Prudential Ins. Co. of Am. Sales Pract. Litig., 133 F.3d 225 (3d Cir. 1998), *cert. denied*, 525 U.S. 817, 119 S. Ct. 55, 142 L. Ed. 2d 43 (1998) 8, 9

Kidd v. Equitable Life Assur. Soc. of U.S., 32 F.3d 516 (11th Cir. 1994), *app. after remand*, 199 F.3d 11 (11th Cir. 1997), *cert. denied*, 522 U.S. 1028, 118 S. Ct. 626, 139 L. Ed. 2d 606 (1997) 8, 10

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Rule:	
NASD Rule 10101	5, 8, 13, 14

REASONS FOR DENYING THE WRIT

The question presented by the Petition is whether Respondent, an insurance sales agent who signed a "Form U-4" containing an agreement to arbitrate disputes with members of the National Association of Securities Dealers ("NASD"), is required to arbitrate a dispute he has with his former employer, an insurance company which is an NASD member. The Petition principally asserts that the decision of the Alabama Supreme Court in this case is at variance with the decisions of four federal circuit courts of appeal.

The facts of this case indisputably show that Respondent sold only insurance policies on behalf of Petitioner. The facts of this case indisputably show that Respondent never sold any securities on behalf of Petitioner. Respondent's complaint in this case alleges breach of contract, fraud and other misconduct that arose out of the Respondent's involvement with the "insurance business" of Petitioner.

Simply put, the facts contained in the record evidence do not raise the question as framed in the Petition.

Because the Alabama Supreme Court's ruling is factually distinguishable, it does not conflict with the federal circuit court decisions and other opinions cited by Petitioner. The Alabama Supreme Court's decision was proper in all respects and does not call for a review by this Court. Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The trial court's order denying Petitioner's motion to compel arbitration of Respondent's claims succinctly and correctly found: "It does not appear that the sale of securities is involved in this case." That factual finding is the bedrock of the trial court's ruling and the Alabama Supreme Court's subsequent affirmance. Applying its earlier decision in *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998), *cert. dismissed*, 525 U.S. 1119, 119 S. Ct. 921, 142 L. Ed. 2d 899 (1999), the Alabama Supreme Court ruled that the trial court's decision was not clearly erroneous and affirmed the denial of Petitioner's motion to compel arbitration.

Respondent wishes to make clear that his complaint in this case makes no claims arising from employment termination, employment discrimination or similar "employment-related" causes of action. Rather, Respondent alleges that Petitioner and another defendant below, Nowlin & Associates: (1) misrepresented material facts to Respondent and breached their contract with Respondent concerning the insurance policies Respondent sold and the commissions Respondent was due to receive from the sales of those insurance policies; (2) deceived Respondent concerning those insurance policies and commissions; (3) suppressed material facts from Respondent concerning those insurance policies and commissions; (4) negligently, recklessly, wantonly and/or wrongfully misrepresented material facts to Respondent concerning those insurance policies and commissions; and (5) fraudulently deceived Respondent concerning those insurance policies and commissions.

In his complaint, Respondent stated: he began an agent relationship with Petitioner and Nowlin & Associates to sell variable rate products, including but not limited to a Payroll Exceptional Life ("PEL") insurance product; he became a top sales producer with the PEL product; the PEL product is a life insurance policy and not a security; he was strongly encouraged to sell PELs; and he was assured that he would be compensated based on his production, including continued commissions and vesting. After September 1995, when the PEL block of business consisting of thousands of life insurance policies was sold to another company, Respondent claims he lost customers, commissions and his vesting as a result of that block sale. Respondent claims that Petitioner and Nowlin & Associates falsely represented to him that the PEL customers were his clients, would continue to be his clients and that Respondent would continue to receive commissions, income and similar vested benefits. Respondent claims he was caused to sustain substantial compensatory damages and great mental anguish as a result of the wrongful conduct of Petitioner and Nowlin & Associates.

In his affidavit presented to the trial court, Respondent averred in pertinent part that: in October 1983 he entered into a "Career Agent's Agreement" with State Mutual Life Assurance Company of America (Petitioner's predecessor) through the office of Nowlin & Associates; in June 1984 he signed a "Form U-4" with State Mutual through Nowlin & Associates; he has personal knowledge of the methods by which Petitioner markets its insurance products; he has personal knowledge of the PEL products marketed by State Mutual which are the subject of this civil action; all of the policies sold under the PEL program were individual universal life insurance policies sold by State Mutual to

groups of employees; the PEL life insurance products are not and never have been registered securities of any sort; his lawsuit arises from misrepresentations made and actions taken by Petitioner and Nowlin & Associates in connection with the marketing of and servicing of insurance policies; no employment action was taken against him by Petitioner or Nowlin & Associates; he voluntarily terminated his employment and association with Petitioner and Nowlin & Associates on June 15, 1997; no wrongful discharge dispute has arisen out of the termination of his employment and association with Petitioner and Nowlin & Associates; and he has made no claims of any wrongful discharge.

Respondent further averred that, when he signed the "Form U-4," he was not aware that he was waiving any of his rights and he had no intention of waiving any of his rights to seek redress in the courts of Alabama in connection with disputes relating to his sales of insurance products.

Respondent had been employed as an insurance sales agent for some eight months when he was asked to sign the "Form U-4" ***so that he might be registered to sell securities for Petitioner in the future — a contingency that never occurred.***

On the last page of the "Form U-4" signed by Respondent, a paragraph appearing above the signature box reads as follows:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, **that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register**, ***as indicated in Question 8.***

(emphasis added.)

The only box checked in the "Question 8" referenced in the "Form U-4" that Respondent signed is a box indicating "NASD," the National Association of Securities Dealers.

Rule 10101, contained in the NASD Manual, sets out "Matters Eligible for Submission" to arbitration. Rule 10101 reads:

> This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, ***with the exception of disputes involving the insurance business of any member which is also an insurance company***:
>
> (a) between or among members;
>
> (b) between or among members and associated persons;
>
> (c) between or among members or associated persons and public customers, or others; and
>
> (d) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and

> participants, pledgees, or other persons using the facilities of a registered clearing agency, as those terms are defined under the rules of such a registered clearing agency.

(emphasis added.)

A copy of a portion of a document filed by NASD with the Securities and Exchange Commission, pertaining to a "proposed rule change" approved by NASD's Board of Governors on July 13, 1979, was submitted to the trial court by Respondent. That document, in part, contains NASD's representations to the Securities and Exchange Commission concerning proposed changes to the NASD's "Code of Arbitration Procedure." Under the heading entitled "Purpose of Proposed Rule Change," the NASD document reads in part as follows:

> [T]he Association has added an exception which would exclude from arbitration "disputes involving the insurance business of any member which is also an insurance company." ***The Association based its determination to exclude such disputes on its belief that the number of insurance-only claims involving insurance companies is so disproportionately large in relation to their securities business that to include such claims would unduly burden the arbitration system. In addition, the inclusion of such claims could result in a requirement to arbitrate matters that are intrinsically insurance, that is, matters with respect to which the Association does not believe it should mandate arbitration.***

(emphasis added.)

Neither the "agent's agreement" entered into between Respondent and State Mutual nor the "agent's agreement" entered into between Respondent and SMA Life Assurance Company contains an arbitration provision.

There is no allegation in Respondent's complaint that he was caused any injury arising from any transaction which was concerned with or related to any registered securities. There is no allegation in Respondent's complaint that is referable to any injury arising from any transaction that was concerned with any aspect of the Petitioner's business other than its insurance business.

Petitioner did not dispute in the proceedings below the assertion of Respondent in his affidavit that "[t]he PEL life insurance products are not and never have been registered securities of any sort." Petitioner did not dispute in the proceedings below that it is an insurance company.

SUMMARY OF THE ARGUMENT

Petitioner argues that the decision of the Alabama Supreme Court in this case: (1) conflicts with the decisions of four federal circuit courts of appeals; (2) conflicts with the policies behind the Federal Arbitration Act; (3) will cause different outcomes in similar cases; and (4) is contrary to the language and history of the NASD Code.

As reasons for denying certiorari review, Respondent contends that the Alabama Supreme Court's decision in this case: (1) is readily distinguishable on its facts from the decisions of the federal circuit courts cited by Petitioner; (2) comports with and advances a fundamental policy of the Federal Arbitration Act, *viz.*, that parties are bound to

arbitrate only those claims that they mutually agree by contract to arbitrate; (3) will not generate different outcomes, on similar facts, in any other cases; and (4) closely follows NASD's own public explanation of the "insurance business" exception to NASD Rule 10101.

ARGUMENT

The Alabama Supreme Court's decisions in this case and in *Hagan* are not as aberrant as Petitioner invites the Court to believe. Petitioner's "four circuits" argument fails due to conspicuous factual distinctions. Petitioner cites as authority for its argument the decisions in *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *In re Prudential Ins. Co. of Am. Sales Pract. Litig.*, 133 F.3d 225 (3d Cir. 1998), *cert. denied,* 525 U.S. 817, 119 S. Ct. 55, 142 L. Ed. 2d 43 (1998); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995); and *Kidd v. Equitable Life Assur. Soc. of U.S.*, 32 F.3d 516 (11th Cir. 1994), *app. after remand*, 199 F.3d 11 (11th Cir. 1997), *cert. denied,* 522 U.S. 1028, 118 S. Ct. 626, 139 L. Ed. 2d 606 (1997). (Petitioner also cites *Metropolitan Life Ins. Co. v. McRae*, 121 F.3d 723 [TABLE, unpublished opinion] (11th Cir. 1997), but 11th Cir. R. 36-2 states that "[u]npublished opinions are not considered binding precedent.")

The second sentence of the *Mouton* opinion stated: "[This case] requires us to decide whether a securities dealer who agreed to arbitrate 'any dispute, claim or controversy that may arise between [himself] and [his] firm' is compelled to arbitrate his Title VII discrimination claim against his employer." 147 F.3d at 454. *Mouton* also noted that the plaintiff was "a seller of mutual funds [who] was required to be licensed by the NASD." *Id.* The *Mouton* opinion held

that "illegal employment discrimination, if it exists, involves an employer's statutory obligations as an employer rather than as an insurer." 147 F.3d at 457.

Unlike the plaintiff in *Mouton*, the facts of the present case show that: (1) Respondent was not "a securities dealer" for Petitioner; (2) Respondent has not made an "employment discrimination" claim against Petitioner; and (3) Respondent was not "required to be licensed by the NASD" in order to sell insurance policies for Petitioner.

The plaintiffs in *In re Prudential* alleged that their former employer "took adverse employment action against them in alleged retaliation for their refusal to participate in the company's insurance sales fraud." 133 F.3d at 227. That opinion further noted: "No party contests the employment nature of the plaintiffs' claims." 133 F.3d at 231.

Distinguishing *In re Prudential* from the present case are the facts that: (1) Respondent does not allege that Petitioner took any "adverse employment action" against him; and (2) Respondent continually and vigorously throughout the proceedings has disputed that his claims are of an "employment nature."

The plaintiffs in *Armijo* presented only "federal and state discrimination claims" after their employment was terminated by their employer. 72 F.3d at 795. The opinion in *Armijo* is peppered with facts disclosing that the plaintiffs in that case "also sold mutual funds," 72 F.3d at 795, "engage[d] in the securities business under the control of Prudential," 72 F.3d at 799, and "each concede[d] in affidavits that they sold mutual funds," 72 F.3d at 799 & n.7.

The facts of the present case are distinguishable from the facts in *Armijo*, in that: (1) Respondent has not made any discrimination claim against Petitioner; (2) Petitioner did not terminate Respondent's employment; and (3) Respondent never sold any securities or engaged in the securities business of Petitioner.

Kidd involved complaints of "race discrimination in violation of Title VII of the Civil Rights Act of 1964," 32 F.3d at 518, brought by two plaintiffs who were "present and former securities sales agents" of the defendant, 32 F.3d at 517.

The record evidence in the present action distinguishes *Kidd*, in that Respondent: (1) has made no federal employment-discrimination claims; and (2) sold no securities for Petitioner.

Aside from those factual distinctions, the record evidence in this case implicates a cardinal policy of the Federal Arbitration Act, which is that parties cannot be compelled to arbitrate any disputes they did not agree to arbitrate. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995) (citations omitted).

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." [. . .] This axiom recognizes the fact that arbitrators derive their authority to resolve

> disputes only because the parties have agreed in advance to submit such grievances to arbitration.
>
> *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986) (citations omitted).

The Court has recognized that the Federal Arbitration Act does not "prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488 (1989). Applying *Volt*, the Fifth Circuit observed that "the policy favoring arbitration embodied in the Federal Arbitration Act cannot trump the express agreement of the parties to exclude matters from arbitration." *Catholic Diocese of Brownsville v. A. G. Edwards & Sons, Inc.*, 919 F. 2d 1054, 1056-57 (5th Cir. 1990), *also citing Moses H. Cone Memorial Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983).

The arbitration agreement entered into by Petitioner and Respondent that is at issue in this case incorporated the "insurance business" exception. Petitioner may not invoke the Federal Arbitration Act so as to "trump" its express agreement with Respondent that excludes from arbitration any claims arising between them that relate to the insurance business of Petitioner.

The Eleventh Circuit articulated that "[t]he federal policy towards a very liberal construction of the Arbitration Act does not permit a court to ignore the precise language of an agreement." *Storer v. Miller*, 914 F.2d 215, 219 (11th Cir. 1990). The *Storer* decision, which construed language in an

agreement that specifically excluded from arbitration certain types of claims, followed the Ninth Circuit's holding in *Van Ness Town Houses v. Mar Industries Corp.*, 862 F.2d 754, 757 (9th Cir. 1988), which said: "Because the parties did not actually agree to arbitrate their securities claims, the policy favoring arbitration does not, by itself, support the district court's order compelling arbitration."

In the present case, the parties did not actually agree to arbitrate any claims that arose out of Petitioner's insurance business, which is all that Respondent's complaint implicates. The policy favoring arbitration does not override the parties' contractual agreement here, either.

There is no record evidence suggesting that Respondent agreed to arbitrate any dispute he had with Respondent arising out of Respondent's sale of any insurance products on behalf of Petitioner. In fact, the "Form U-4" incorporated by reference the "insurance business" exception contained in the revised NASD Code provisions. Respondent's affidavit provides abundantly clear record evidence of his intention at the time he signed the "Form U-4." At that time he did ***not*** intend to arbitrate any "insurance policy" disputes.

"We have previously held that the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76 (1995), *citing Volt Information Sciences.*

The Alabama Supreme Court's *Hagan* decision observed:

> [T]he fact that Hagan may also have been entitled to sell some form of "securities" that were not within the "insurance business" of MIMLIC does not undermine this Court's conclusion that the disputes set forth in Hagan's complaint involve the insurance business of the defendants within the meaning of § 10101.

721 So. 2d at 170 & n.1.

The undisputed record evidence in the present case shows that the PEL products over which Respondent's lawsuit arose were insurance policies and never were registered securities. As was the case in *Hagan*, the fact that Respondent ***may*** have been "entitled to sell some form of 'securities' " does not undermine the trial court's conclusion and the Alabama Supreme Court's subsequent determination that the disputes set out in Respondent's complaint "involve the insurance business" of Petitioner within the ambit of the exception set out in NASD Rule 10101. Respondent signed the "Form U-4" in the event he should be called upon to sell registered securities — a contingency that never occurred. Respondent's complaint in no way implicates the securities business of Petitioner.

Based upon the record evidence, the trial court correctly found that Respondent did not agree to submit to arbitration his insurance-policy disputes with Petitioner. The Alabama Supreme Court correctly determined that the trial court's ruling was not clearly erroneous and affirmed.

Because its decision was so fact-driven, the Alabama Supreme Court's decision in this case should not generate any substantially different outcomes in cases whose facts are similar. But, it should be the rare case indeed where the record evidence similarly presents the circumstances of an insurance sales agent who never sold any securities of any sort and whose complaint raises no employment-related claims and whose employer seeks to compel arbitration under the NASD Code.

Finally, a separate and sound basis for denying review of the Alabama Supreme Court's decision in this case is that NASD itself — in its written submission to the Securities and Exchange Commission — explained that its reason for proposing the "insurance exception provision" to Rule 10101 was that insurance-only claims were imposing an undue burden on NASD's arbitration system. This stark record evidence quickly disposes of Petitioner's argument that the Alabama Supreme Court's decision in this case is "contrary to the language and drafting history of the NASD Code." (Brief of Petitioner at 10-11.)

If the NASD Code's "language and history" says anything at all, it says that NASD's arbitration machinery was becoming overloaded with non-securities, insurance-related claims and NASD told the Securities and Exchange Commission that NASD wished to shed itself of claims that "would unduly burden the arbitration system." Language rarely is that plain and history infrequently is so clear.

The Second Circuit, in *Thomas James Associates, Inc. v. Jameson*, 102 F.3d 60, 64 (2d Cir. 1996), made the following observation:

> We cannot fathom any possible reason why the NASD would except insurance business disputes from arbitration, but then only when those disputes involved certain parties. Rather, the NASD probably meant to exempt "any dispute involving the insurance business of an insurance company member from compulsory arbitration, not just those involving specific classes of individuals."

(citations omitted).

If NASD's "insurance business" exception cannot apply to the facts of this particular case, the exception could not apply to any set of facts. Petitioner's absurd argument would reduce that exception to a useless appendage.

The NASD arbitral regimen was never intended to apply to the circumstances presented by the facts of this case. Petitioner's figure-eight argument does not overcome the conclusion that Respondent's claims cannot be compelled to arbitration. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Information Sciences*, 489 U.S. at 478, 109 S. Ct. at 1256. Because Petitioner seeks coercion in lieu of contractual compliance, the Petition is due to be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

DAVID HALL MARSH
Counsel of Record
THOMAS MARSHALL POWELL
MARSH, RICKARD & BRYAN, P.C.
Attorneys for Respondent
800 Shades Creek Parkway
Suite 600-D
Birmingham, Alabama 35209
(205) 879-1981